No. 03-1564

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF CLEARWATER, FLORIDA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF CLEARWATER, BRIAN AUNGST, SR. AND WILLIAM HORNE

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions cited by Petitioner, Respondent includes the following:

(1) Article III, § 2 of the United States Constitution:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the Untied States shall be a Party;-to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) Article 3, Division 18 (§§ 3-1801–3-1807) of the City of Clearwater Community Development Code.[1]

(3) Article 4 of City of Clearwater Community Development Code, "Development Review and Other Procedures." ("Development Review Procedures" or "Article 4").

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1. Article 3, Division 18 is Appendix "1" to the district court's order granting summary judgment and is therefore already contained as part of Petitioner's Appendix (77a-99a). Article 4 was included in the district court's order as Appendix "2" and is similarly part of Petitioner's Appendix (100a-139a).

STATEMENT OF THE CASE

I. OVERVIEW OF THE CASE

Petitioner seeks review of a decision by the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") which reversed the district court's grant of facial overbreadth standing to Petitioner Granite State Outdoor Advertising, Inc. ("Granite State"). In proceedings before the district court and the Eleventh Circuit, Granite State sought to utilize the limited overbreadth exception to facially challenge the City of Clearwater, Florida's ("City" or "Clearwater") comprehensive sign regulations *in their entirety*.

In denying Granite State's attempt to utilize the facial overbreadth doctrine in this manner, the Eleventh Circuit followed this Court's long-standing admonition that the overbreadth exception is one of limited application and is "manifestly, strong medicine" to be used "sparingly and only as a last resort." In so adhering to this Court's precedent, the Eleventh Circuit has put an end to ever increasing attempts by the outdoor advertising industry to manipulate and transform the facial overbreadth doctrine into an instrument of commercial gain under the guise of First Amendment vindication.

The Eleventh Circuit's decision is consistent with the development of this Court's jurisprudence regarding both the constitutional limitations on standing as well as the exception to the prudential limitations on its exercise. Contrary to Petitioner's assertions, the *Clearwater* decision does not limit or even implicate the First Amendment rights of third party litigants. Rather, the decision has provided much needed guidance to federal courts within the Eleventh Circuit which face a growing number of cases filed for the sole purpose of facially invalidating comprehensive land development

regulations which would otherwise restrict the size, height, number and location of outdoor advertising structures.

II. FACTUAL BACKGROUND

Granite State is a Georgia corporation engaged in the business of buying or leasing land upon which to construct[2] billboards. (2a). Since its incorporation, Granite State has never erected or operated a billboard. (2a). Rather, Granite State receives its profits from the sale of billboard *permits* that it obtains from various cities and municipalities. (3a). Granite State has received profits from the sale of at least twenty-two billboard permits to Eller Media which were obtained from similar litigation brought against various cities and municipalities in the state of Georgia. (18a). Granite State employs only two persons and operates out of the Georgia residence of its president, who previously worked for two outdoor advertising companies. (18a).

Clearwater is a resort community on the west coast of the state of Florida with more than five miles of beaches on the Gulf of Mexico. (3a). Clearwater, like many other municipalities, has enacted a comprehensive land development scheme for regulating the permitting, placement, number, size, height, design, operation, and maintenance of sign structures within the City's boundaries. (3a) Article 3, Division 18 (§§ 1801-1807) of the City's Community Development Code ("CDC") regulates sign structures. (19a). Section 3-1802 contains the many specific purposes of the sign regulations, including traffic safety and preservation of aesthetics. (3a, 19a-20a). The sign regulations also contain a provision under the "General Standards"

2. Granite State's repeated mis-characterization of its intent to "post" signs is misleading. Granite State's applications sought to construct massive sixty-five foot billboard structures that would require building permits.

subheading of section 3-1804.H which provides, "*notwithstanding any other provision of this Code, no sign shall be subject to any limitation based on the content of the message contained on such sign.*" (21a). There is no distinction between commercial and noncommercial speech within the sign regulations. (21a).

Division 18 is comprehensive (3a) and regulates four general categories of signs. (21a). Section 3-1803 completely prohibits twenty-five different types of signs (such as portable signs, vehicle signs and roof signs). (21a). Section 3-1805 allows the display of twenty different types of signs *without* a permit (such as safety and warning signs, holiday decorations, garage or yard sale signs and "for sale" signs). (21a). Section 3-1806 sets forth certain height, area and lighting requirements for residential signs (subdivision development and multifamily entry signs and school and park identification signs) and non-residential signs (freestanding, monument, transit, shelter and attached signs). (4a, 21a). Signs contained within Section 3-1806 require a permit under the City's development review process. (4a, 22a). Section 3-1807 permits signs that comply with eight enumerated flexibility criteria. (22a). Section 3-1804's "General Standards" prescribe building and electrical code compliance and regulate setback, lighting and illumination, banners and flags, gasoline price signs, and time and temperature signs. (22a).

Article 4 of the City's Code, entitled "Development Review and Other Procedures", sets forth the process for obtaining various levels and types of permit approval, including permits for sign structures. (4a, 22a). The process for sign permit approval, which is designated as a "level one approval" is contained in Divisions 3, 5 and 10 of Article 4. (22a). The initial step of the permitting process is to complete the application process. (22a). Once submitted, section 4-102C.1 requires that

a determination of completeness shall be made by the community development coordinator within five days. (22a). Within five or ten working days after that determination is made, the community development coordinator or members of the development review committee must determine whether the application is "legally sufficient." (23a). An application is "legally sufficient" if "the required application materials have been prepared in a substantively competent manner." (23a). If insufficient, the application is deemed withdrawn. (23a). Once an application is deemed complete and legally sufficient, the development review committee then reviews the application in accordance with the applicable division of the Code. (23a). In the case of a sign permit, the committee reviews the application for compliance with Article 3, Division 18. (23a). An appeal may be taken to the Community Development Board which holds a "quasi-judicial public hearing." (23a). A hearing officer has the authority to hear appeals from the Community Development Board. (23a).

Granite State entered into lease agreements for a total of eight parcels of real property located in commercial or industrial areas of Clearwater. (3a). On August 10, 2001, Granite State submitted applications to construct freestanding billboard structures that were sixty-five feet high and 672 square feet in area on each parcel of property. (24a). Granite State's proposed signs were more than four times the allowable height and ten times the allowable area. (3a). Pursuant to Section 3-1806.B which prohibits freestanding billboard signs in excess of fourteen feet in height and in excess of sixty-four square feet in area per side, the City's planning department denied the applications on the same day they were submitted. (3a). On each application, the City noted the reason for denial: "*Refer to Section 3-1806(B1)*" and "*Height, Size and Numbers of Signs (Total Square Feet on Parcel).*" (24a). Granite State did not appeal the

initial denial of its applications, as permitted under Article IV of the City's Code, but rather on August 31, 2001, brought suit against the City in the United States District Court for the Middle District of Florida (the "district court"). (24a).

III. PROCEEDINGS BELOW

On August 31, 2001, Granite State filed an eleven-count complaint against the City of Clearwater; its Mayor, Brian Aungst, Sr.; and its City Manager, William Horne. (24a). The complaint alleged that the Article 3, Division 18 and Article 4 were facially invalid on numerous constitutional grounds, including various First Amendment grounds. The complaint was not limited to the constitutional validity of Section 3-1806.B, under which Granite State's permits had actually been denied. Instead, Granite State mounted a shotgun style attack, noting every conceivable constitutional infirmity and every possible misapplication in the numerous sections of the City's comprehensive sign regulations. In arguing that various portions of the City's Community Development Code were facially invalid, Granite State contended that the sign regulations should be struck in their *entirety,* including Section 3-1806.B, and that an injunction should be entered compelling the City to issue all eight permits in the resulting absence of any valid ordinance restricting the issuance of such permits. On July 18, 2002, Clearwater adopted an Amended Ordinance, which revised some of the challenged provisions of Articles 3 and 4 of the CDC.

On July 23, 2002, the district court entered summary judgment in favor of the City (16a-139a). Although the district court determined that Granite State, which had never appealed the denial of its permits, did *not* have overbreadth standing to challenge the lack of time limits in the appeal provisions of the development review procedures (Article 4), the district court noted that it was "constrained" to find that Granite State did

have standing to mount a facial challenge to Article 3, Division 18 (33a). Although the district court subsequently concluded that certain provisions were unconstitutional, it severed these provisions, leaving the remainder of Division 18, including Section 3-1806.B under which the permits had been denied, completely intact. (38a).

Granite State appealed the district court's decision on numerous grounds, including its determination that Granite State, which had never initiated an appeal, lacked standing to challenge Article 4's appeal provisions. On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that the district court had "misapplied the overbreadth doctrine" with regard to Article 3, Division 18 (4a) and that Granite State lacked standing to facially challenge *either* Article 3, Division 18 (the sign regulations) or Article 4 (the development review procedures) (4a, 7a). Noting that "Granite State has neither alleged nor shown how the City's permitting and appeals procedure has injured Granite State," the Eleventh Circuit upheld the trial court's determination that Granite State did not have standing to challenge the City's development review procedures. ("*Clearwater* decision") (4a). In upholding the district court's decision, the Eleventh Circuit found that Granite State had failed to demonstrate an actual *injury in fact* and that as a result, no justiciable "case" or "controversy" existed with respect to Granite State's challenge to Article 4. (7a-8a). However, the Eleventh Circuit reversed the district court's determination that Granite State had standing to mount a facial overbreadth challenge to the entirety of the sign regulations (Article 3, Division 18) (7a).[3] Noting that the overbreadth doctrine is not

3. Although Granite State did not cross-appeal the trial court's finding that Granite State had standing to challenge Article 3, Clearwater argued on appeal, and the Eleventh Circuit determined, that insofar as it presents a question of subject matter jurisdiction, the question of standing may be raised at any stage of the litigation.

an exception to the *constitutional* standing requirements, the court noted that Granite State's only injury in fact resulted from Section 3-1806.B, which contained completely content-neutral height, size, and location requirements, and that Granite State's ability to mount a facial challenge was correspondingly limited to that section of the CDC. (6a-7a). The Eleventh Circuit concluded that Granite State had failed to demonstrate an actual injury from any other part of Article 3, Division 18, and thus did not have standing to facially challenge any other portion of the City's comprehensive sign regulations. (6a-7a).

REASONS FOR DENYING THE PETITION

I. CERTIORARI REVIEW IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION DOES NOT CONFLICT WITH THIS COURT'S HOLDINGS REGARDING THE OVERBREADTH STANDING DOCTRINE.

A. *The Clearwater decision, far from "eviscerating" the overbreadth standing exception, clarified its proper application and is consistent with this Court's prior decisions.*

On June 16, 2003, this Court issued its opinion in *Virginia v. Hicks*, 539 U.S. 113 (2003). In *Hicks*, issued five months prior to the Eleventh Circuit's *Clearwater* decision, this Court admonished that over-application of the facial overbreadth doctrine results in "substantial social costs." *Id.* at 119. The Court noted that even the "chilling effect" of a law which is actually overbroad, "cannot justify prohibiting all enforcement of that law—particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Id.* This Court went on

to re-affirm that a law's overbroad application to protected speech must be "substantial" before it is invalidated:

> To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, . . . , before applying the "strong medicine" of overbreadth invalidation. . . .

Id. (internal citations omitted).

Consistent with this recent admonition, the *Clearwater* decision has put an end to a pervasive misapplication of the overbreadth doctrine within the Eleventh Circuit which has caused the very sort of "substantial social costs" noted last year by this Court in *Hicks*. In this case, Petitioner seeks to use the overbreadth doctrine to invalidate a content-neutral permitting scheme, a result that would, as this Court cautioned, "swallow the social benefits of declaring a law 'overbroad.'" *Id.* With increasingly frequency, the overbreadth doctrine has been used by outdoor advertising companies to mount facial challenges against municipal sign regulations for the sole purpose of having those ordinances struck down in their entirety. In doing so, these litigants have utilized the prior "broad, but not controlling, language" of this Court "torn from its original setting." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 556 (1981) (Burger, C.J., dissenting). This practice has been especially successful within the Eleventh Circuit where state law has proven useful to various commercial industries who have prevailed on arguments that allegedly unconstitutional provisions are not *severable* and that a company who applies for permits under a subsequently invalidated ordinance has a *"vested right"* to issuance of those permits. The result of such

an attack is that it often leaves no ordinance or regulations in place with which a municipality may deny permits for billboard structures. One district judge in the Eleventh Circuit has described this alarming trend as follows:

> The instant action represents yet another case in what seems to be an ever-increasing trend through which outdoor advertising companies facially challenge municipal ordinances seeking to strike down such ordinances as entirely void. There have been a series of cases by billboard companies across the Eleventh Circuit against municipal zoning ordinances raising the same facial challenges here asserted. Through these actions, advertising companies transform the proverbial First Amendment shield, intend to protect noncommercial speech, into a sword that assures their commercial well-being.

National Advertising Co. v. City of Miami, 287 F. Supp.2d 1349, 1356-57 (S.D. Fla. 2003) (James Lawrence King, J.)

In curtailing the use of facial overbreadth challenges to purely content-neutral municipal zoning and land development regulations, the Eleventh Circuit correctly applied this Court's prior decisions with respect to standing and facial overbreadth. In particular, the Eleventh Circuit properly determined, consistent with this Court's prior decisions: (1) that even a litigant who intends to raise the First Amendment rights of third parties must *first* demonstrate a cognizable *injury in fact* under the Article III "case" or "controversy" requirement; and (2) that content-neutral zoning and land development regulations are not subject to facial overbreadth challenges. Because these holdings were entirely consistent with prior decisions of this Court, Granite State's petition should be denied.

B. *The Overbreadth Doctrine does not Eliminate the Constitutional Requirement that a Litigant must Suffer an Injury in Fact.*

Petitioner begins with the incredible assertion that the *constitutional* requirement that a litigant must demonstrate an actual injury is not strictly necessary when making a facial overbreadth challenge. Respondent is unaware of any decision by this Court which holds that a *constitutional* requirement may ever be ignored or waived, and Petitioner appears to confuse the prudential limitations on standing, which may be relaxed under certain limited circumstances, with constitutional requirements, which must always be met. Petitioner cites several cases, including *Virginia v. American Booksellers,* 484 U.S. 383 (1988), *Warth v. Seldin*, 422 U.S. 490 (1975), and *United States v. Raines*, 362 U.S. 17 (1960) in support of the proposition that "'countervailing considerations may outweigh the actual injury requirement.'" Upon review, however, none of the cases cited support the proposition that the actual injury requirement may be ignored. In fact, in *Warth,* the Court held that some of the litigants did not have standing due to their failure to demonstrate an actual injury. 422 U.S. at 507-08. In *American Booksellers*, the Court concluded that the plaintiffs had *met* the injury in fact requirement because the law "was aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." 484 U.S. at 392. The Court in *American Booksellers* went on to note the distinction between the injury in fact requirement and the exceptions to the prudential limitations on standing. *Id.* at 392-93.

This Court has recently reiterated the long-standing constitutional principle that Article III, § 2 of the United States Constitution *requires* that there be a "case" or "controversy" before a federal court may decide a case. *See Elk Grove Unified*

School District et al. v. Newdow, 124 S. Ct. 2301, 2308 (2004), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992). In ensuring that Article III's case or controversy requirements are met, this Court has identified three *constitutional* requirements for standing: (1) an injury in fact; (2) a causal connection between the injury and the conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The constitutional requirements for a federal court to adjudicate a case are accompanied by prudential requirements, "which [embody] 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove*, 124 S. Ct. at 2308, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (internal citations omitted).

These judicially crated prudential considerations "reflect the conviction that under our constitutional system, courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Metromedia*, 453 U.S. at 546 (Stevens, J., dissenting). These constitutional and prudential requirements together make up the two "strands" of the doctrine of *standing*. *Elk Grove*, 124 S. Ct. at 2308, citing *Lujan*, 504 U.S. at 559-62.

A well recognized prudential limitation is the "general prohibition on a litigant's raising another person's legal rights." *Allen*, 468 U.S. at 751. One such exception to the prudential limitations on standing is the facial "overbreadth exception" which applies in First Amendment cases involving non-commercial speech and which permits a litigant to raise the rights of third parties when there is a *substantial* danger that a statute that is constitutionally applied to the litigant may be unconstitutionally applied to others not before the court. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The Eleventh Circuit offered a crucial clarification to the overbreadth principle however, noting that "[t]he overbreadth doctrine is not an exception to the *constitutional* standing requirements." (6a), citing *Birshoff v. Osceola County, Fla.*, 222 F.3d 874, 884 (11th Cir. 2002)). The Eleventh Circuit's clarification is completely adherent to the Court's holdings on this same issue. This Court has consistently held that while prudential requirements on standing, which are judicially created, may be relaxed under some circumstances, the requirements of Article III can never be waived or ignored, and that a plaintiff seeking to make an overbreadth challenge must first demonstrate an *injury in fact. See, e.g., American Bookseller Ass'n*, 484 U.S. at 392-93; *Village of Schaumburg*, 444 U.S. at 634. In discussing various exceptions to the prudential limitation on standing, this Court noted: "Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth*, 422 U.S. at 501.

In this case, the Eleventh Circuit determined, consistent with this Court's prior case law, that the only section of Article 3 which Granite State had been subject to, and therefore suffered injury from, was Section 3-1806.B's height and size requirements. (7a). The court properly determined that Granite State had not been injured by any other provision of Article 3, Division 18; nor had Granite State been subject to Article 4's appeal procedures, as it had chosen not to appeal the City's permit denial. The Eleventh Circuit's decision was entirely consistent with this Court's prior decisions with respect to the constitutional requirement that a plaintiff demonstrate an actual injury.

In support of its contention that the Eleventh Circuit departed from prior case law, Petitioner cites prior decisions, including *Burson v. Freeman*, 504 U.S. 191, 210, n.13 (1992),

and *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755, 756 (1988), in support of its argument that a litigant need not suffer an actual injury prior to mounting a facial challenge. Petitioner's reliance on these cases is misplaced. Much confusion is created by Petitioner's improper interpretation of the fact that an overbreadth litigant may raise the constitutional rights of others not before the Court even when the challenged law has not been *unconstitutionally* applied to the particular litigant who brings the claim. Although this exception has been permitted in the First Amendment context, the Court has never held that a litigant need not be subject to the challenged statute *at all.* Petitioner appears to improperly equate *unconstitutional application* with an Article III *injury*. A facial overbreadth plaintiff must always demonstrate the latter, but not necessarily the former. This is the essence of a facial challenge. However, the fact that a litigant need not demonstrate that a law has been unconstitutionally applied to him, does not mean that a litigant need not demonstrate an actual injury arising from the challenged provision. In this case, the only injury suffered by Granite State, as noted by the Eleventh Circuit, was the denial of its permit under Section 3-1806.B. Accordingly, the Eleventh Circuit correctly and consistently determined that Granite State must demonstrate an actual injury in fact.

C. *The Eleventh Circuit correctly determined, consistent with this Court's prior decisions, that Granite State did not have overbreadth standing to challenge any provision other than Section 3-1806.B.*

In challenging the Eleventh Circuit's decision, Granite State contends that if it has standing to assert a facial challenge under Section 3-1806.B, it must necessarily have standing to assert a facial challenge under the extensive remaining provisions of Article 3, Division 18 and Article 4. Granite State bases its contention that it may challenge the City's entire sign permitting

scheme on its over-extended reading of footnote 11 to this Court's plurality decision in *Metromedia, Inc. v. City of San Diego*. In *Metromedia*, a plurality of this Court held that an outdoor advertising company, whose interests were *primarily* commercial, could challenge those aspects of the ordinance which exempted certain noncommercial speech. 453 U.S. at 504, & n.11. Although the *Metromedia* plurality permitted the plaintiff to challenge certain non-commercial exemptions to that general restriction, it did so upon a finding that plaintiff had both a commercial and a noncommercial interest in speech, noting that their billboards "also convey a substantial amount of noncommercial advertising." *Id.* In contrast, as noted by the lower court in this case, Granite State has never erected a billboard. (2a). Its profits have been derived from the sale of billboard *permits*. Its interests are therefore nothing but commercial, and because it has never even erected a billboard, it has no interest whatsoever in non-commercial speech. Moreover, unlike the ordinance at issue in *Metromedia*, Article 3, Division 18 of Clearwater's Community Development Code is a comprehensive set of guidelines covering multiple zoning areas and sign structures, and covering both permitted and nonpermitted signs. Division 18 contains no distinctions between commercial and noncommercial messages. (21a).

Petitioner's contention that it may challenge any portion of a comprehensive code is based on the often mis-cited footnote 11 in *Metromedia* which states as follows: "[w]e have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." *Id.* at 504, n.11. This footnote was pure dictum as the plurality had already determined that Metromedia could challenge all aspects of the ordinance "in its own right." *Id.* at 504. Moreover, far from representing the opinion of the

Court, it simply notes that the Court had never reached a decision on the issue. *Id.* Petitioner, and many other outdoor advertising companies, have attempted to extrapolate, from footnote 11, a judicial mandate that a plaintiff may challenge any portion of a land development regulation or a zoning ordinance if any particular section of that regulation implicates the First Amendment. Such an extensive interpretation is nonsensical as aptly noted by District Judge King:

> It defies logic and all reasonable interpretation of the language of *Metromedia* . . . where the Supreme Court has simply said that it has not yet determined that an entity with a commercial interest can *never* raise a First Amendment challenge to the facial validity of a statute, into a legal principle that even a slight (*de minimis*) interest in noncommercial speech by a overwhelmingly proportionate commercial speech billboard company thus giving it the right to take up the sword on behalf of noncommercial advertisers. . . .

National Advertising Co. v. City of Miami, 287 F. Supp.2d at 1362.

It should also be noted that such an extension of the overbreadth doctrine is contrary to the history of its development. The overbreadth doctrine developed as a remedy for laws that by their very generalized nature swept constitutionally protected activity within their prohibitions. Vagrancy and loitering ordinances are primary examples. *See, e.g.*, *Broadrick*, 413 U.S. at 602 (law generally restricting political activities of state civil service employees); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (law prohibiting loitering and picketing).

Such statutes, however, traditionally applied to one type of conduct or category of conduct which was defined in such a general manner so as to sweep within its grasp, certain constitutionally protected conduct. For this reason, the overbreadth doctrine allowed those who had not been *constitutionally* injured (for instance, one arrested for loitering), to mount a facial attack on the statute on behalf of third parties whose First Amendment rights might be inhibited by the potentially broad scope of the regulation at issue. *See Metromedia*, 453 U.S. at 546-57 (Stevens, J., dissenting).

In contrast, municipal land development regulations and zoning regulations contain numerous separate sections and provisions with very specific applications. In that respect, they are the antithesis of the type of law historically subject to overbreadth challenges. Where those laws were general,[4] and normally directed to one type of problem or conduct, the type of land development regulations at issue in this case are carefully crafted and represent efforts to regulate all kinds of *structures*.

Contrary to Petitioner's assertion, this Court has never held that a party who has suffered injury from some portion of a comprehensive municipal regulatory scheme has standing to challenge both that section and all other sections, including those under which it has suffered *no* injury. If that were the case, courts would be forced to invalidate numerous zoning or land development regulations on the basis of some conceivable misapplication of a tiny portion of them. For instance, it is inconceivable that a plaintiff arrested under an adult entertainment prohibition in a zoning ordinance may challenge

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4. In contrast, the Court's recent decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2001), which permitted a facial challenge to the Child Pornography Prevention Act of 1996, is an example of the type of law historically subject to a facial overbreadth challenge.

each and every provision of an entire municipal zoning ordinance which might touch upon the First Amendment. In fact, this Court recently declined to issue a holding as to whether an individual who has been affected by a portion of a law *unrelated* to the First Amendment may even maintain a facial overbreadth challenge. *See Hicks*, 539 U.S. at 122, n.3. The Court further noted in *Hicks* that "rarely if ever will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech. . . ." Rather, as the Court noted, in such cases, applications of the policy at issue that violate the First Amendment may be remedied "through as-applied" litigation. *Id.* at 124, 123 S. Ct. at 2199.

The problem with Petitioner's interpretation of overbreadth standing, and an issue pointed out by Justice Souter's concurrence in *Hicks*, is how to define the scope of the regulation which may be subject to a facial overbreadth challenge. *Id.* at 124-125, 123 S. Ct. at 2199-2200. At the very most, this is a question that this Court has not yet had occasion to resolve. For that reason, the Eleventh Circuit's refusal to permit a facial overbreadth challenge to every aspect of Section 3-1806 and to Article 4 was entirely consistent with this Court's prior decisions and does not merit certiorari review.

Additionally the Eleventh Circuit properly determined that this case is distinguishable from a line of this Court's decisions including *City of Lakewood* and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), in which the Court determined that litigants may facially challenge schemes which vest the decision-maker with unbridled discretion to restrict First Amendment activity. (8a). In the past, this Court has held that a facial challenge was proper where the regulations at issue targeted protected activity such as assembly and parades (*Forsyth*) and permitting for placement of news racks (*Lakewood*). As this Court clarified, not every law which grants

discretion to a decision maker is subject to a facial overbreadth challenge. Rather, "[t]he law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Lakewood*, 496 U.S at 759. As an example, this Court has stated that a law granting discretion in the issuance of *building permits* would not pose the danger of censorship, noting that "such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 761. This Court recently held, in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 124 S. Ct. 2219 (2004), that even an adult business *licensing* scheme, which utilizes neutral and nondiscretionary criteria, is not entitled to the heightened judicial consideration given to censorship schemes in *Freedman v. Maryland*, 124 S. Ct. at 2226. The Court noted that those denied licenses will always remain free to raise special problems of undue delay in individual cases as the ordinance is applied. *Id.*

In keeping with the *Lakewood* reasoning, the Eleventh Circuit correctly pointed out that the Clearwater Community Development Code gives no similar discretion to restrict First Amendment activity to the permitting authorities as existed in cases such as *Lakewood*. (9a). In both *Lakewood* and *Forsyth*, the plaintiff was directly impacted by a regulation which, due to the discretion vested in decision-makers, had the potential to chill First Amendment activity even if it did not chill the First Amendment activity of the Plaintiff. In this case, Plaintiff has suffered no injury in fact from any provision of the CDC which implicates the First Amendment or which vests undue discretion. Rather, the provision of the Code under which Petitioner's permits were denied sets forth content-neutral size, height, and location requirements, unrelated to First Amendment activity. Clearwater's code is a content-neutral permitting

scheme, which contain guidelines similar to those used to issue a building permit. Accordingly, the Eleventh Circuit's decision that the CDC was not the proper subject of a facial overbreadth analysis does not fall into the category of circumstances under which this Court has recognized the propriety of a facial overbreadth challenge and does not conflict with this Court's line of decisions in *Lakewood* and *Forsyth*.

II. THE *CLEARWATER* DECISION DOES NOT CREATE CONFUSION AMONG THE CIRCUITS, AND NO OTHER CIRCUIT HAS RULED ON THE TYPE OF ORDINANCE AT ISSUE HERE.

Petitioner claims that certiorari review is warranted because the Eleventh Circuit's decision conflicts with decisions from other Circuit Courts of Appeal. Upon review, however, none of Petitioner's cited decisions address the standing issue that was presented to the Eleventh Circuit in this case. The relevant standing question in this case was created by a specific, but increasingly frequent, set of circumstances, namely, a business entity with a purely *commercial* interest in speech applies for permits to construct massive oversized billboards and then seeks to use such denial as a platform to facially challenge every other sign regulation in a municipality's land development regulations, including purely residential and non-commercial aspects of the regulations which have absolutely no possible application and have caused no injury in fact to the plaintiff. The cases cited by Petitioner do not address the type of abuse and manipulation of the First Amendment presented in this case, and in fact, none of the cases present similar factual circumstances at all. Many of the cited cases do not even address the question of Article III standing. Accordingly, the cases cited by Petitioner, as discussed below, do not conflict with other circuit case law to any degree necessary to warrant certiorari review.

Petitioner cites two cases, *Déjà vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2002), and *Giovanni Carandola, Ltd v. Bason*, 303 F.3d 507 (4th Cir. 2002), which address challenges to adult entertainment licensing schemes. As such, these decisions do not conflict with the Eleventh Circuit's decision. Rather, they are inapplicable to the extent that this Court has set forth stricter criteria for addressing adult business *licensing* schemes, which by their very nature, target a particular entertainment industry, than it has for content neutral permitting schemes. *Compare FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990), and *Thomas v. Chicago Park District*, 122 S. Ct. 775, 779-780 (2002). Thus, some of the more stringent requirements for licensing schemes, such as applicable time limits and access to prompt judicial review, do not apply to content-neutral *permitting* schemes which do not target any particular viewpoint or message. *See Thomas*, 122 S. Ct. at 779-780.

Additionally, Petitioner has cited cases involving non-commercial speech interests which were raised by persons directly harmed by the regulation at issue. In *Ackerly Communications of Massachusetts, Inc. v City of Cambridge*, 88 F.3d 33, 34 (1st Cir. 1996), a billboard company which displayed 46 *non-commercial* signs brought an action to preclude enforcement of an order directing it to take down its signs. Unlike the situation in Clearwater, the plaintiff in *Ackerley* had substantial non-commercial speech interests and was ordered to take down already-standing signs. The plaintiff thus suffered a direct injury and was arguably affected by the alleged constitutional infirmity — that the ordinance impermissibly protected non-commercial on-premises signs but did not protect non-commercial off-premises signs.

Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994), also involved a plaintiff's non-commercial speech interest. In *Rappa*, a political candidate brought suit challenging a regulatory scheme that removed a large number of political signs along Delaware's roadways. *Id.* at 1047. The *Rappa* case did not address the question of standing. However, the ordinance exempted certain other commercial and non-commercial signs, and thus implicitly, the Plaintiff had standing to present the question of whether his non-commercial messages were unconstitutionally restricted while others were protected.

In *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), the Ninth Circuit specifically addressed whether the plaintiff had suffered an actual injury in fact. In determining that the plaintiff had met the Article III "case" or "controversy" requirements, the court noted that the plaintiff had suffered an injury because the City had brought an enforcement action in order to compel the removal of its signs. *Id.* at 818. The court's holding that the Plaintiff need not apply for a permit in order to bring a facial challenge under some circumstances is inapplicable to the facts presented in this case. The *Desert* court was addressing whether Plaintiff needed to apply for a permit to challenge the substantive portion of the sign regulations when it had already been subject to an enforcement action under those same regulations. *Id.* at 818. The court did not address whether it needed to apply for a permit in order to challenge the permitting *procedures* — the type of challenge brought by Granite State in challenging the appeal procedures of Article 4. Moreover, unlike the *Granite State* case, there was no question that Desert Outdoor had suffered injury due to the enforcement of the ordinance (and the forced removal of its signs). *Id.* at 818. Moreover, it should be noted that Desert Outdoor was directly impacted, and thus arguably suffered injury, from a permitting procedure that vested officials with

discretion to prohibit any display with a "harmful effect upon the health or welfare of the general public." *Id.* at 817. In this case, as the Eleventh Circuit specifically noted, Granite State's permits were denied on the basis of non-discretionary size, height, and location requirements. (9a-10a). Granite State was not subject to the type of discretion that directly impacted Desert Outdoor.[5]

Petitioner also cites *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990), and *Lamar Advertising of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365 (2d Cir. 2004). Although Respondent maintains that these cases were incorrectly decided and were not in accord with this Court's prior decisional case law, these cases are clearly distinguishable and are not a source of confusion in connection with the Eleventh Circuit's decision. In *Town of Babylon*, the Second Circuit spoke in terms of the "speech" that the appellant municipalities sought to "restrict." 900 F.2d at 555. The Second Circuit determined without discussion that the lower court was correct in determining that National had standing to challenge the Long Island municipalities' ordinances. The lower court had noted that National's signs had been used to carry non-commercial messages and that the Metromedia Court's plurality had determined that Metromedia's signs were used to "carry a host of non-commercial messages." *National Advertising Co. v. Town of Babylon*, 703 F. Supp. 228, 231 (E.D.N.Y. 1989). The lower court had concluded that the non-commercial speech rights of third parties were "inextricably tied" to National's activities. *Id.* at 232. Hence, the lower court concluded that National could thus challenge various non-commercial aspects of the Long

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5. It should be noted that contrary to the position taken by Petitioner in Parts I & IV of its brief, the *Desert Outdoor* Court clearly acknowledged that a Plaintiff must demonstrate an injury-in-fact. *Id.* at 818.

Island municipalities' regulations. *Id.* Unlike National Advertising Co., Granite State had never erected a single sign; nor had it displayed a "host of non-commercial messages."

In *Town of Orchard Park* unlike *Granite State*, Lamar Advertising of Penn, LLC set out in its complaint that it was interested in building signs of different sizes, including fifty (50) signs measuring 72-square feet, which would be a size allowed in Orchard Park's industrial zones. Section 144-38.1(A)(2) of Orchard Park's sign ordinance allowed signs in industrial zones up to 80-square feet per side. 356 F.3d at 374. The Second Circuit determined that this factor distinguished the case from *Hart Advertising Illinois, Inc., v. Village of Chicago Ridge, Illinois*, 9 F.3d 1290 (7th Cir. 1993), where the plaintiff was exclusively interested in building a 1,200 square foot sign where no sign larger than 200 feet was permitted. The same contrast is true here, where Granite State was exclusively interested in securing permits to erect signs 65-feet tall and 672-square feet in size, where no sign taller than 14-feet or larger than 64-square feet in area is permitted.

Peachlum v. City of York, 333 F.3d 429 (3d Cir. 2003), is also inapplicable. In *Peachlum*, the court concluded that a citizen had standing to challenge a local ordinance regulating yard signs which prohibited the plaintiff from displaying a yard sign containing a religious message but exempted certain other yard signs, including those containing certain commercial messages. The court found that the plaintiff could facially challenge the ordinance even though no final administrative decision had been reached with respect to an enforcement action taken against her. *Id.* at 438. In contrast to the facts of this case, *Peachlum* presented the type of circumstances where a facial overbreadth challenge is appropriate—where a private citizen's ability to display a religious message on her own property is encumbered

by municipal regulation. Thus, *Peachlum* stands in sharp contrast to the relief sought by Granite State, and is an example of the proper use of a facial overbreadth challenge.

Finally, *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1005 (9th Cir. 2003), is completely inapplicable as it involved an action by a Right-to-Life political action committee who sought to challenge a state statute requiring advance notice before distribution of certain political literature and advertising ten days before an election. The Ninth Circuit noted that the Plaintiff had suffered actual injury due to the fact that it had been forced to modify its speech and behavior to comply with the statute. *Id.* at 1006-1007. In contrast to the *Clearwater* case, the *Arizona* case is an example of the proper circumstances in which a plaintiff has standing to challenge a provision that had not yet been enforced against it due to the fact that it was forced to alter its *speech* to avoid adverse consequences. In the instant case, Granite State has not been forced to modify its *speech*. Rather, Granite State has been precluded from constructing massive oversized billboard structures, irrespective of whether any message, commercial or otherwise, will ever be placed on such structures. Accordingly, as set forth above, Petitioner has failed to demonstrate that the Eleventh Circuit's decision "creates confusion among the circuits" on an important question of federal law. Rather, if anything, the decision will clarify the appropriate circumstances under which commercial industries should be precluded, due to a lack of standing, from challenging municipal regulations for purely commercial gain.

III. THIS CASE PRESENTS NO RISK TO "PROTECTED SPEECH" WHICH SUFFICES TO CONFER OVERBREADTH STANDING ON GRANITE STATE.

This Court has long-since held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broaderick*, 413 U.S. at 601. This requirement that courts measure the proportion of the potentially restricted speech against the law's legitimate application cannot be ignored. *See Hicks*, 539 U.S. at 122, n. 3. In *Hicks*, this Court noted that the trespass policy at issue could not "fall" by reason of the overbreadth doctrine unless the policy, *taken as a whole*, was substantially overbroad in relation to its plainly legitimate sweep. *Id.*

Additionally, overbreadth standing would not be appropriate in this case where Granite State was not itself subject to any provision of the regulations that vested undue discretion in City officials. Even assuming that the district court correctly determined that certain limited portions of the regulations vested too much discretion in the hands of City officials, these sections are only a minor portion of the overall sign regulations. Thus, taking into consideration this Court's proportionality requirement, the sign regulations are clearly an inappropriate subject for a facial overbreadth challenge as any constitutional infirmity would be completely insubstantial in relation to the regulations' "plainly legitimate scope" which in this case includes safety and the preservation of aesthetics. This Court's recent decisions display an increased recognition that as-applied challenges are the normal and appropriate remedy, and that facial overbreadth challenges are "strong medicine" to be reserved for limited and extreme circumstances. *See, e.g., Hicks*, 539

U.S. at 124 (noting that applications of the loitering policy that violate the First Amendment can be remedied through as-applied challenges); *Thomas v. City of Chicago Park*, 122 S. Ct. at 781 (provision of content-neutral permitting scheme which might allow park district to waive permit requirements would be an abuse that must be dealt with "if and when a pattern of unlawful favoritism appears"); *City of Littleton*, 124 S. Ct. at 2226 (noting that individuals denied licenses "remain free to raise special problems of undue delay in individual cases as the ordinance is applied.")

Far from preventing proper application of the overbreadth doctrine, the Eleventh Circuit has adhered to this Court's admonition that the overbreadth exception must not "swallow the general rule." As this Court has noted, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).[6] Accordingly, the Eleventh Circuit's conclusion that Granite State did not have standing to bring a facial challenge was consistent with this Court's prior case law which has consistently cautioned that the overbreadth doctrine must remain the truly exceptional remedy.

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6. In Section IV of its brief, Petitioner contends that a litigant bringing a facial overbreadth challenge need not demonstrate an injury in fact. Respondent addresses this argument in Section I of its brief in response.

CONCLUSION

The Eleventh Circuit's decision correctly determined that Granite State did not have standing to challenge the remaining portions of Clearwater's Land Development Code, under which it suffered no injury. Although legitimate First Amendment concerns are of paramount importance to courts, "plaintiffs must not be allowed to manipulate courts' visceral need to protect the First Amendment. Instead, courts must vigilantly reject arguments intended to pervert that Amendment's primary purpose." *National*, 287 F. Supp. 2d at 1356. The Circuit Court of Appeals, in denying standing to the Petitioner, has appropriately and necessarily, alleviated further manipulation of the First Amendment in the Eleventh Circuit. For the foregoing reasons, Granite State's petition should be denied.

Respectfully submitted,

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